Supreme Court of the United States

OCTOBER TERM, 1913

No. 71

D. R. WILDER MANUFACTURING COMPANY,

Plaintiff in Error

versus

CORN PRODUCTS REFINING COMPANY,

Defendant in Error

REPLY BRIEF OF MARION SMITH

for Plaintiff in Error

(23,450)

Supreme Court of the United States

D. R. WILDER MANUFACTURING COMPANY,
Plaintiff in Error,
versus
CORN PRODUCTS REFINING COMPANY,
Defendant in Error.

No. 392,
October Term, 1913.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

This case was reached for argument last Spring, and was continued until the present October Term on account of the illness of the counsel for the defendant in error. Prior to the time it was reached last Spring, we filed our brief for the plaintiff in error, as provided by the rules of Court. The brief for the defendant in error was served upon us on the ninth of October, 1914.

In this brief for the defendant in error, the legal theory on which the position of the defendant in error was sustained by the majority of the Court of Appeals of Georgia appears to be entirely abandoned, and an entirely new theory is advanced in support of that side, which is not only different from the decision of the Court of Appeals of Georgia, but is conflicting with many things either held by that Court or assumed without express decision.

In the brief of the counsel for the defendant in error, two propositions are asserted:

1. That the answer does not set out sufficient facts showing the defendant in error to be a combination violative of the Sherman Act on account of its restraint of interstate trade.

2. That no contract of any kind existed between the parties either as to (a) the profit sharing plan, or (b) the covenant against re-sale.

—1—

The first proposition proceeds on the theory that our answer alleges simply the general conclusion that the defendant in error is an illegal combination in restraint of trade. If this assumption were correct, it would raise an interesting question as to how far this general conclusion of fact is admitted by a motion to strike the answer in the nature of a general demurrer. As, however, this assumption is not correct, it is unnecessary to discuss this question, or the cases which are cited with the claim that they support it.

The answer alleges the following matters with reference to this point:

1. That the defendant in error is a corporation formed by the consolidation of certain named Companies and other firms and corporations.

2. That before the consolidation of the said firms and Companies into the corporation which is the defendant in error, each of said firms and corporations were independent and competing manufacturing concerns manufacturing glucose and grape sugar, glucose being the kind of goods for the purchase price of which this suit is brought.

3. That the purpose of said combination was to restrain and monopolize interstate commerce in said commodities.

4. That this purpose was carried out successfully by the establishing of a complete monopoly, and that at the time the profit sharing contracts were issued, the defendant in error by this combination had so completely monopolized the industry that it was the only person, firm or corporation in the United States manufacturing and selling glucose.

5. That the combination after establishing the monopoly greatly and exorbitantly enhanced the price at which its commodities were sold.

None of the above propositions are stated as conclusions of law, but as specific allegations of fact. It is conceded that they might have been stated in greater detail. It is probably true that an appropriate special demurrer would have required some of them to be amplified, but it cannot be held that they are not sufficiently alleged as against a motion in the nature of a general demurrer, nor can it be denied that these facts, if true, constitute the defendant in error an illegal combination in violation of the Sherman Act. Both the Standard Oil Case and the American Tobacco Company Case proceed upon the theory that a restraint of trade is necessarily unreasonable, and, therefore, violative of the Federal Act, where it has as its purpose and effect monopolizing the industry or enhancing prices. The answer in this case alleges as specific allegations of fact that the result of the combination was to establish a total monopoly, and to greatly enhance prices.

The injustice of allowing a motion to strike the answer to serve the purpose of a special demurrer is illustrated by the present case, should such a conclusion be reached in the present case. Had an appropriate special demurrer been filed calling for a more detail statement on any of these propositions, we could have met it by an appropriate amendment before a final judgment was rendered. If, however, the motion to strike is allowed to fulfil this function of a special demurrer, it will result in a final judgment being rendered on that account when no notice has been given by any appropriate pleading that a more detail statement in any of these respects is required.

It is also to be observed that the Court of Appeals of Georgia does not base its decision on the ground that our answer is not sufficient under the Georgia practice as against a general motion to strike. While the Court criticises the answer for not going sufficiently into detail, it expressly assumes the allegations in this respect to be sufficient for the purpose of its decision, and bases its decision squarely on the interpretation of the Federal Anti-Trust Act, which is discussed in our brief. The Court says:

promisor is relieved, because that is the condition of the contract, but the contract is binding when it is made upon a sufficient consideration. It is none the less a contract because conditions are attached to it.

The whole doctrine of mutuality in contracts is one of consideration. Thus in Page on Contracts, Section 302, the rule is stated as follows:

> "The principles which control in determining the validity of a promise as a consideration are substantially the same as those which apply to consideration in general. The promise must be such as to offer a legal right or the forbearance of a legal right to which the promisor would not otherwise have been entitled. On the one hand, it is not necessary that the contract, if in writing, be in one instrument in order to be mutually binding. The agreements may be in two separate written instruments, even though executed on different days if in fact a part of the same transaction; or the agreement may be written on the one side and oral on the other.
>
> *"Neither is it necessary that each covenant on the one part have a corresponding obligation on the other, apportioned to that particular covenant, since one consideration can support several promises. Thus, where as part of the lease, lessor agreed to give lessee sixty days' notice of an intended sale, and to give him the first opportunity to purchase, such promise is valid though lessee did not agree to buy. So if A buys a certain lot of logs from B with a privilege of taking another amount at a specified price, a consideration for the contract exists.*
>
> "On the other hand, if the promise offers only what the promisor is already entitled to, there is no consideration. So if a promise does not offer any enforceable legal right or forebearance it is not a consideration. This principle is sometimes expressed in the rule

that promises, in order to be valid consideration each for the other, must be mutual."

(The italics are by us.)

Many familiar illustrations of this could be suggested. A sale of land might be made with a provision in the contract that the seller shall have the right to re-buy within a certain time at a certain increased price, and although the seller is not bound to re-buy no Court would deny that the option is binding on the purchaser. A sale might be made with a provision that the purchaser should have a right to a rebate in the purchase price at the end of the year, provided he performed certain services for the seller, which it was optional with him to perform or not under the contract. In such an instance, the seller could not compel the performance of the services, but his contract to rebate a part of the purchase price would unquestionably be binding on him, if the purchaser complied with the conditions. Many other familiar illustrations could be given.

Counsel for the defendant in error say: "To test the soundness of counsel's argument, it is asked whether at the time of the purchase in question the plaintiff in error was bound to the defendant in error to either do or not to do any specific act." We respectfully submit that to apply such a test in the present case would be to disregard elementary conceptions of the law of contracts. Where the sole consideration for a promise is a promise of the opposite party this test is appropriate. Where, on the other hand, there is an executed consideration (as in the case at bar the purchase of goods being the executed consideration for the promised rebate, upon the conditions specified in the promise of rebate) the test is not appropriate. Thus in Clark on Contracts, page 169, the author quotes with approval from L'Amoreux vs. Gould, 7 N. Y. 349, the following with reference to cases where the want of mutuality destroys a contract: "It is confined to those cases where the want of mutuality would leave one party without a valid or available consideration for his promise."

A good illustration is furnished by the case of Joy vs. the City of St. Louis, 138 U. S. 1. For an adequate consideration, a Railroad Company agreed to permit another Company to use its right-of-way on certain terms. It was objected that this promise was void for lack of mutuality, in that the other Company had not accepted the privilege, and was not bound to use the track and comply with the terms stated in the agreement. The eighteenth head note is as follows:

> "A contract by one railroad company to permit other railroad companies to use its right of way does not lack mutuality, where the consideration is ample, and such company cannot resist the enforcement of the privilege on the ground that it cannot compel the other company to continue in its enjoyment."

The question is whether the exclusive trade of the purchaser for the time mentioned in the offer is a condition precedent to the beginning of the contract or a condition precedent to the maturity of the promise. Instead of the test submitted by counsel, we suggest the following test: Suppose the purchaser in reliance upon this promised rebate commences giving his exclusive trade to the vendor. Suppose at the expiration of six months of exclusive trade in 1909 the vendor should notify the purchaser that it had determined to withdraw its promised rebate upon past trades. Can it be doubted that the purchaser could appropriately reply that it had accepted the offer by trading exclusively with the vendor for six months, and that it had a contract right to this rebate upon the condition specified in the contract, to-wit, that it continue giving its exclusive trade to the vendor for the specified period? We believe there can be but one answer to this question. The purchases by the plaintiff in error accepted the offer. Thereupon arose a contract, to pay this rebate upon the compliance with the conditions specified, the purchases furnishing the consideration for the contract. It is distorting the real relationship of the parties to say that these conditions must be complied with before any contract arises. The contract arises when the first purchase under the offer is made, and the conditions are merely a part of the contract.

The only authority cited by counsel for the defendant in error to this proposition is the case of **Georgia Cane Products Company vs. Corn Products Refining Company, 141 Ga. 40.** The case is cited as presenting a substantially identical state of facts, and as holding that a similar profit sharing arrangement did not constitute a contract. Counsel appear to construe the decision as holding that the profit sharing arrangement involved in that case was not a contract, because the purchaser had not accepted it. The case, however, is wholly different from the case at bar; the profit sharing arrangement involved in that case is different in one vital particular; and the Court's opinion is based on a different reason from that argued by counsel.

The pleas of the defendant in the Georgia Cane Products Company case as to the Sherman Act were abandoned and not presented to the Supreme Court of Georgia. The only question presented to that Court was the claim of the defendant for a set-off equal to its rebate claimed under its profit sharing arrangement for 1910. The answer in that case alleged that a definite rebate was offered for each year up to 1910, but that no offer was made for 1910, but that an assurance was made that the profit sharing arrangement on some indefinite basis would be continued for 1910.

The Court held there was no contract between the parties for 1910, not because, as suggested in this case, the purchaser had not accepted the offer, but because, as the Court clearly points out, no definite offer had been made by the vendor. As the Court says: "The defendant alone cannot make one [referring to a contract.]" The Court's position is too clearly sound for argument. Of course a contract for a rebate must specify the amount of the rebate or it is meaningless, and an offer that is meaningless, no matter how definitely accepted can not make a contract. The case, however, has no bearing whatever on the position urged by counsel for the defendant in error, but involves a totally different question.

In the case of **Storm vs. United States, 94 U. S. 76,** this Court says:

> "Agreements are frequently made which are not, in a certain sense binding on both sides at the time when executed, and in which the whole duty to be performed rests primarily with one of the contracting parties."

With reference to such a contract involved in that case the Court says:

> "Where the defendant has actually received the consideration of a written agreement, it is no answer to an action brought against him for a breach of his covenants in the same to say, that the agreement did not bind the plaintiff to perform the promises on his part therein contained, provided it appears that the promises in question have, in fact, been performed in good faith and without prejudice to the defendant."

The performance either whole or partial furnishes a consideration for the contract, although, of course, the liability of the other party could not be enforced until the conditions of the contract are fulfilled.

As bearing generally on the subject, reference may be made to the following cases:

> Sheffield Furnace Co. vs. Hull Coal & Coke Co., 101 Ala. 446;
>
> Fontain vs. Baxley, 90 Ga. 416;
>
> Cooper vs. Lansing Wheel Co., 94 Mich. 272.

A familiar class of cases involving this question are those presenting substantially the following situation: Real estate is placed with a real estate broker for sale under an agreement giving to the broker an exclusive right of sale for a certain length of time, or providing that if sold by the owner for a certain period the broker is to have his commission. In these cases where no immediate consideration passes, it is obvious that at the time of the delivery of the writing the broker is not required to perform any service, and, therefore, at that time no binding contract has been formed. When,

however, the broker proceeds to spend either his time or his money in an effort to sell the property, a consideration for the contract is furnished, and the owner cannot withdraw from it during the period, even though no purchaser has actually been found.

Attix vs. Peland, 5 Ia. 336;

Lapham vs. Flynt, 86 Minn. 376;

Metcalf vs. Kent, 104 Ia. 487;

Kimbrell vs. Skelly, 130 Cal. 555;

Hoskins vs. Fogg, 60 N. H. 402.

An interesting case in this connection is **Goward vs. Waters, 98 Mass. 596,** in which the Court says:

> "The position of the defendant's counsel is undoubtedly true, that at the time the contract was signed it was a mere nudum pactum. The plaintiffs paid nothing, incurred no expense or loss, and entered into no obligation on their part. They were at liberty to act or not, as they pleased; and would incur no liability by failing to do anything. But it is also apparent that the writing contemplated services to be rendered and expenses to be incurred by the plaintiffs for the defendant; and that the promises were made in view of such future services and expenses. The writing is merely a stipulation, by the defendant, of the terms upon which compensation shall be made by him. Subsequent performance of services and expenditure of money, in prosecution of the employment thus authorized, furnish a sufficient consideration for the promises of the defendant."

The principles established by the authorities herein cited when applied to the facts of this case require the conclusion that when under the offer made to the plaintiff in error it commenced giving its 1909 trade to the defendant in error, it ac-

cepted the proposition and furnished a consideration for the contract. The contract was, of course, conditioned on its continuing to give its exclusive trade, and if it failed to do so the promise of the defendant in error never matured, but the contractural relation came into existence when the trading commenced, and from then on the defendant in error could not withdraw from its promise, except upon a breach of the condition which entered into the existing contract of the parties.

The brief of counsel for the defendant in error also argues that the covenant against re-sale is not a part of the contract because it is expressed in an invoice, and counsel argues that an invoice is not a contract of sale.

As a matter of fact, the answer does not allege that the covenant was expressed in an invoice, but alleges that it is expressed in each "contract of sale," so counsel's argument is not applicable to the facts in this case.

We are probably responsible for this mistake, as in our brief we inadvertedly referred to this covenant as appearing in an invoice instead of using the expression "contract of sale," which appears in the answer.

As a matter of fact, however, it is entirely immaterial as to the name applied to the paper in which the agreement is expressed. An ordinary invoice is not a contract passing title. Like any other paper, however, it may be the medium used to express the contract between the parties, in whole or in part. In **9 Cyc. 260** the following general statement of this principle is given: "A contract may be formed by accepting a paper containing terms. If an offer is made by delivering to another a paper containing the terms of the proposed contract, and the paper is accepted, the acceptor is bound by its terms."

It is, therefore, respectfully submitted that the contractural relation between the parties to this case embraces the profit sharing plan upon the conditions therein expressed, and the covenant against re-sale; and that there is no sound foundation for the argument that this case can be distinguished from the Continental Wall Paper case upon the proposition that in the case at bar a contract between the parties is not shown.

For the sake of the argument, however, it may be assumed that all of these arrangements between the parties should not be regarded as contracts. It cannot, however, be argued that they were not the means adopted for perpetuating the illegal monopoly of the defendant in error. Their purpose in this respect is shown on their face, and their operation in this respect is shown by the allegation of the answer that they enabled the defendant in error to maintain a practically complete monopoly, and to enhance prices to an exorbitant extent.

Nor can it be argued that the sales were not made with reference to and in execution of this profit sharing arrangement. It was proposed as a definite arrangement covering all sales, and every sale made thereafter was necessarily made with reference to the plan, and in execution thereof.

Suppose the arrangement is called a plan or device or offer for illegally restraining and monopolizing interstate trade instead of a contract for restraining and monopolizing interstate trade, and it is conceded, as it must be conceded, that the sales were made in execution of and with reference to such plan on the part of the illegal combination. The question would arise does this on principle affect the situation?

In the Continental Wall Paper Co. Case the recovery was denied because the sales were made with reference to and in execution of the plan adopted to accomplish the illegal end of the combination. That plan happened to be a contract. Its illegality, however, consisted not in the fact that it was a contract but in its purpose and effect. Any plan or method of accomplishing the same end is illegal.

Nash vs. United States, 229 U. S. 373;

Swift & Co. vs. United States, 196 U. S. 375;

Loewe vs. Lawlor, 208 U. S. 274.

When the sales are made with reference to and in execution of the plan by which combination carries into effect its illegal purpose, it can make no difference whether the plan consists of contracts or other means.

Respectfully submitted,

MARION SMITH,

Attorney for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1913

No. ~~892~~ 71

D. R. WILDER MANUFACTURING COMPANY

Plaintiff in Error

versus

CORN PRODUCTS REFINING COMPANY

Defendant in Error

BRIEF AND ARGUMENT IN BEHALF OF CORN PRODUCTS REFINING COMPANY, DEFENDANT IN ERROR

JAMES W. AUSTIN,
Attorney for Defendant in Error

JAMES W. AUSTIN
MORGAN J. O'BRIEN
ALBERT B. BOARDMAN
PRESTON DAVIE
YOUNG B. SMITH
Of Counsel.

(23,450)

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IN THE

Supreme Court of the United States

No. 392 OCTOBER TERM, 1913

D. R. WILDER MANUFACTURING COMPANY,
Plaintiff in Error.
versus
CORN PRODUCTS REFINING COMPANY,
Defendant in Error.

Appeal from Court of Appeals of Georgia.

BRIEF AND ARGUMENT IN BEHALF OF CORN PRODUCTS REFINING COMPANY, DEFENDANT IN ERROR.

STATEMENT OF CASE.

The Corn Products Refining Company, defendant in error, brought suit on open account against the D. R. Wilder Manufacturing Company, plaintiff in error, in the City Court of Atlanta, May Term, 1909, to recover the purchase price of two shipments of glucose sold and delivered during the year 1909.

The plaintiff in error filed its answer in which it admitted the purchases on open account at the prices alleged, the receipt of the glucose, and its failure to pay for it, but plead that the purchase price could not be collected because the defendant in error was an unlawful combination and conspiracy in restraint of interstate trade.

The plaintiff in error further alleged in support of its defense that the defendant in error had sent to it a letter dated March 9, 1907, in which letter the defendant in error announced the inauguration of a policy whereby it offered to give to its customers a rebate of "some certain amount per hundred pounds upon all purchases of glucose or grape sugar during any years, provided, and upon the condition that, the said purchaser, during the following year, gave to the said Corn Products Refining Co., its exclusive patronage."

The plaintiff in error further defended on the ground that upon each invoice for the glucose purchased, appeared the clause: "The goods herein sold are for your own consumption only, and not for re-sale," which is characterized as a "contract" in restraint of trade.

The plaintiff in error did not allege that it accepted the offer of defendant in error, or that it bound itself by agreement to purchase exclusively from defendant in error, or that it promised not to re-sell the goods purchased, or that any agreement existed between them other than the contract of sale, or that it was in any manner or way a party to, or connected with, the alleged illegal combination in restraint of trade.

On the other hand, the plaintiff in error admitted in its answer that it did not accept the offer of defendant in error to give a rebate, and that it did not in fact purchase exclusively from the defendant in error, by alleging in paragraph 10 of its answer that it was entitled to rebates on its purchases for the year 1908 "notwithstanding its failure to comply with said condition."

The defendant in error filed a motion to strike the answer as setting out no legal defense, which motion was sustained and a verdict and judgment rendered against the plaintiff in error.

On writ of error the Court of Appeals of Georgia af-

firmed the judgment of the City Court. (Wilder Manufacturing Co. vs. Corn Products Refining Co., 11 Ga. App. 588).

The question before this Court, therefore, is solely whether the allegations of the answer, as pleaded, are sufficient to constitute a legal defense to the suit under the Act of Congress of July 2, 1890, commonly referred to as the Sherman Anti-Trust Act.

BRIEF.

I.

The answer filed by the plaintiff in error does not allege sufficient facts to support the conclusion of the pleader that the defendant in error is an unlawful combination and conspiracy in restraint of interstate trade, and was formed for the purpose of monopolizing and restraining trade in violation of the Act of Congress of July 2, 1890, referred to as the Sherman Anti-Trust Act.

Standard Oil Co. v. United States, 221 U. S. 1;

United States v. American Tobacco Co., 221 U. S. 106;

Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U. S. 227;

Connolly v. Union Sewer Pipe Co., 184 U. S. 679;

Wilder Mfg. Co. v. Corn Products Co., 11 Ga. App. 588.

IX.

The so-called "profit sharing plan," and similar methods of merchandising, do not violate the provisions of the Sherman Act.

Whitwell v. Continental Tobacco Co., 125 Fed. 454;

In re Corning, 51 Fed. 205;

In re Green, 52 Fed. 105.

X.

The defense urged by the plaintiff in error that upon each invoice for the glucose purchased was inserted the clause, "The goods herein sold are for your own consumption only and not for re-sale," alleged to be a "contract" in restraint of trade, is merely a conclusion of the pleader.

XI.

It is well established that an invoice is not a bill of sale, nor is it evidence of a sale, nor does it constitute a "contract of purchase."

Dows v. National Exchange Bank of Milwaukee, 91 U. S. 618;

Miller v. Van Tassel, 24 Cal. 458.

XII.

The failure of the plaintiff in error to allege that it agreed to the clause against re-sale is fatal to its plea.

Georgia Cane Products Co. v. Corn Products Refining Co., supra.

XIII.

Even though it were true that a promise not to re-sell had been made, this fact alone would not bring the case within the decision of this Court in Continental Wall Paper Co. v. Louis Voight & Sons Co., supra.

CONCLUSION.

WHEREFORE, the decision of this Court in the case of Connolly v. Union Sewer Pipe Co., supra, is controlling, and the judgment of the Court of Appeals of Georgia should be affirmed.

ARGUMENT.

The answer filed by the plaintiff in error does not set out sufficient facts to show either contract, combination or conspiracy to restrain trade in violation of the Act of Congress of July 2, 1890, referred to as the Sherman Anti-Trust Act.

The Court of Appeals of Georgia deemed it unnecessary to decide whether the failure of the plaintiff in error to set forth in its answer sufficient facts to support the general allegation that the defendant in error is an illegal combination was, under the Georgia practice, reached by a motion to strike the answer, since the judgment in favor of the defendant in error was sustained upon another ground. Though the Court declared:

> "However, as stated, we make no express ruling on this question."

The Court did decide on the other hand that:

> "The answer was clearly subject to special demurrer. The allegation that the plaintiff is an unlawful combination and conspiracy in restraint of interstate trade, and was formed for the purpose of monopolizing and restraining trade, is clearly a conclusion of the pleader, and no sufficient facts seem to be alleged to support this conclusion and bring the case within the recent decisions of the Supreme Court of the United States in Standard Oil Co. v. United States, 221 U. S. 1; and United States v. American Tobacco Co., 221 U. S. 106."

It is urged, nevertheless, that the failure of the plaintiff in error to allege facts making out its defense was fatal, and that the answer was subject to the motion to strike which, under the Georgia practice, is equivalent to a general demurrer.

This defect was not one which could only be reached by a special demurrer. A special demurrer is necessary only where the defect is one of form and not of substance. But where the defect is a failure on the part of the pleader to allege facts which make out his case on the one hand, or his defense on the other, it is subject to general demurrer.

In Martin v. Bartow Iron Works, supra, the leading Georgia case upon this question, the Supreme Court clearly stated the distinction.

(At page 322 of the opinion).

> "A general demurrer enables the party to assail every substantial imperfection in the pleadings of the opposite side without particularizing any of them in his demurrer, but if he thinks proper to point out the faults, this does not vitiate it.

> "A special demurrer goes to the structure merely, and not to the substance, and it must distinctly and particularly specify wherein the defect lies."

The above language was quoted with approval by the Court of Appeals of Georgia in Douglas, etc., R. Co. v. Swindle, supra.

In the case of James v. Kelley, et al., supra, the Supreme Court of Georgia sustained a general demurrer to a petition setting forth only general allegations of fraud, the Court declaring (page 452).

> "The charges of fraud and collusion other than the foregoing, and the intent on the part of the administrator to defraud petitioners in such sale, are made in general terms, with no other specific acts alleged than those which have been enumerated. The rule is that the pleadings must state facts and not legal conclusions; and fraud is never sufficiently pleaded except by a statement of the facts upon which the fraud is based. General charges will not be considered. Tolbert v. Caledonian Insurance Co., 101 Ga. 741. For these reasons, the petition presented did not set forth a cause of action, and the Court committed no error in sustaining the demurrer to the same."

The above ruling is sustained by the decisions of the Court of Appeals in Carroll v. Hutchinson, 2 Ga. App. 60, and in Moultrie v. Schofield, etc., Co. 6 Ga. App. 464. In the latter case the Court declared (page 469).

> "3. The plea alleging that the defendant was induced to sign the note and the contract because of fraudulent representations was properly stricken. The plea consisted for the most part of conclusions of the pleader, and did not set forth specific acts constituting fraud, or facts justifying the conclusion pleaded."

It is well settled that under the Georgia practice a motion to strike is the equivalent of a general demurrer.

In Walden v. Walden, supra, the Supreme Court of Georgia declared (page 146):

> "Good practice would require that the plaintiffs should take advantage of the fatal defect in the defendant's plea either by demurrer or by a motion to strike made before verdict."

In the case of Morgan v. Cobb, supra, the plaintiff sued the defendant upon certain promissory notes. The defendant in her answer admitted the execution and delivery of the notes to the plaintiff and that he was the owner of the same and had the right to sue thereon, but set up by way of special plea general allegations of fraud on the part of the plaintiff without setting forth sufficient facts to support the allegations. The plaintiff made a motion to strike the plea which motion the lower Court over-ruled. On appeal to the Supreme Court of Georgia the judgment was reversed and it was held that the plea should have been stricken.

This decision is controlling upon the point that where facts sufficient to support the conclusion relied upon are not alleged in the answer, that a motion to strike the plea should be sustained.

An examination of the answer filed by the plaintiff in error reveals that the allegations therein contained are mere conclusions of the pleader.

No facts are set out which show that the defendant in error is a combination or conspiracy in restraint of interstate trade.

No agreements are set out, or other facts stated which show that the purpose of the formation of the defendant in error corporation was to restrain interstate trade.

No agreements or other facts are alleged which show that the plaintiff in error was, or is, a member of, or a party to, the alleged illegal combination in restraint of interstate trade.

The answer contains general allegations of "agreements" to give rebates, and "contracts" in restraint of trade, but these allegations also, as shown later in this Brief, are mere conclusions of law, as no such agreements are set out in the answer, and no facts are alleged which in law constitute a contract.

For these reasons, it is respectfully submitted, that the answer filed by the plaintiff in error does not set out sufficient facts to show either contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, and does not come within the decisions of this Court in Standard Oil Co. v. United States, supra; United States v. American Tobacco Co., supra; and Continental Wall Paper Co. v. Louis Voight & Sons Co., supra.

It is clearly settled by the decision of this Court in Connolly v. Union Sewer Pipe Co., supra, that a violation of the Sherman Anti-Trust Act, by the formation of a combination in restraint of trade, does not preclude the company thus illegally formed from recovering on collateral contracts for the purchase price of goods.

As declared by Mr. Justice Harlan, who wrote the opinion in that case (page 686):

> "If the contract between the plaintiff corporation and the other named corporations, persons, and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations, or associations, directly connected therewith, became sub-

ject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold—such property not being at the time in the course of transportation from one state to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid."

The meaning of this decision can be no better expressed than in the exact language of Mr. Justice Harlan above quoted, that **where there is no necessary legal connection between the sale and the alleged arrangement in restraint of trade,** a suit for the purchase price of the goods sold will be upheld because such **is not an action to enforce the terms of the unlawful arrangement.**

Attention is called to the language used by Mr. Justice Harlan, that there must be a ***"legal connection"*** between the sale and the unlawful arrangement in order that the Sherman Act shall apply to the contract of sale.

This language, it is submitted, makes clear the mean-

ing of the subsequent decision of this Court in Continental Wall Paper Co. v. Louis Voight & Sons Co., supra, also written by Mr. Justice Harlan, and upon which the plaintiff in error rests its case.

In the case of Continental Wall Paper Co. v. Louis Voight & Sons Co., supra, the facts were that previous to the sales in question the plaintiff and defendant had entered into a written bilateral contract whereby the plaintiff agreed to sell to the defendant and the latter agreed to buy exclusively from the plaintiff, the same being an arrangement for the restraint of interstate trade, and the purchases there in question were made by the defendant in the performance of its part of the unlawful agreement. The contract of sale was a part of and inseparable from the unlawful contract; the buyer and seller were both parties to the unlawful combination by virtue of a binding agreement previously made, and to have given effect to the sale would have necessitated upholding the unlawful bilateral contract which compelled the purchase. Therein exists the *"legal connection"* which Justice Harlan had in mind when he wrote the opinion in the case of Connolly v. Union Sewer Pipe Co., supra.

Indeed, Mr. Justice Harlan in distinguishing the two cases employed the same reasoning. Beginning on page 261 of the opinion in the case of Continental Wall Paper Co. v. Louis Voight & Sons Co., supra, the following appears:

> "The case now before us is an entirely different one. The Continental Wall Paper Co. seeks, in legal effect, the aid of the Court to enforce a contract for the sale and purchase of goods which, it is *admitted by the demurrer was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme.* We state the matter in this way, because the plaintiff by its demurrer admits for the purposes of this case the truth of all the facts alleged in the third defense. It is admitted by the demurrer to that defense that

the account sued on has been made up *in execution of the agreements* that constituted or out of which came the illegal combination formed for the purpose and with effect of both restraining and monopolizing trade and commerce among the several states.

"The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and *pursuant to which* the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Co. was organized. If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the Court in making effective the illegal agreements that constituted the forbidden combination. These considerations make it evident that the present case is different from the *Connolly Case.*"

(The italics are by the Court).

The distinction is clear and plain. In the Connolly Case there existed no contractual relations between the buyer and seller other than that of vendor and purchaser. The former was not bound to sell and the latter was not bound to purchase. And, as stated by this Court in the case of Continental Wall Paper Co. v. Louis Voight & Sons Co., supra, with reference to the Connolly Case (page 261):

"In that case the Court regarded the record as presenting the question whether a voluntary purchaser of goods at stipulated prices, under a collateral, independent contract, can escape an obligation to pay for them upon the ground *merely* that the seller, who owned the goods was an illegal combination or trust. We held that he could not,

and nothing more touching that question was decided or intended to be decided in the *Connolly Case.*"

In the Continental Wall Paper Co. Case, however, both plaintiff and defendant were parties to a written, binding contract in restraint of trade. The seller was bound to sell and the buyer was bound to purchase. The purchase was not voluntary. It was not by virtue of a collateral, independent contract, but was made in performance of, and pursuant to, an existing bilateral contract which was unlawful, and which was a part of, and inseparable from, the contract of sale.

Borrowing the language of the Court (page 262):

> "The question here is whether the plaintiff company can have judgment upon an account which, it is admitted by demurrer, was made up, within the knowledge of both seller and buyer, with direct reference to and in execution of certain agreements under which an illegal combination, represented by the seller, was organized. Stated shortly, the present case is this: The plaintiff comes into Court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the States and asks a judgment that will give effect, so far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment cannot be granted without departing from the statutory rule; long established in the jurisprudence of both this country and England, that a Court will not lend its aid, in anyway, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which as between man and man he ought, perhaps, to pay, but for which he is unwilling to pay."

In the case of International Harvester Co. of America v. Oliver, supra, Cochran, J. speaking for the Circuit Court, E. D. Kentucky, declared (page 66):

> "The sole difference between the facts of the two cases, as I make it out, is that in the Connolly Case the purchaser was not, and in the Voight & Sons Case he was, a member of the combination, not, however, willingly so, or to the same extent as others were—i. e., as a seller—but in that before he purchased he had agreed with the seller members of the combination to purchase from no one else than the combination and to re-sell at prices fixed by the combination. There is reason to suspect that in reality the cases were substantially the same, i. e., that in the Connolly Case, also, the purchaser was in like manner a member of the combination, and that in considering and disposing of the case this feature of it was overlooked or ignored. The basis of this suggestion is to be found in the closing part of Mr. Justice Holmes' dissenting opinion. And at best the difference between the two cases is a very narrow one. Yet, notwithstanding this, the distinction which Mr. Justice Harlan, who wrote the opinion in both cases, drew between the two cases, which was thought to call for a difference in decision, is a plain one, and there ought to be no difficulty in determining on which side of the dividing line this case belongs. It is clear that it comes within the Connolly case, and not within the Voight & Sons Case. It is not possible to say that the defendant here was a member of or a party to the illegal combination set forth in the second paragraph of the defendant's answer. And if the true relation between the plaintiff and defendant was that of principal and agent, and the contracts sued on were mere pretenses, the case is not otherwise.
>
> "If the purchaser of property from an illegal combination is bound to pay the purchase price, so

is one who receives property from it upon a contract to sell same for it at certain prices by a certain date, or account to it for those prices at that time, if not then sold."

In the case of United States Fire Escape Counterbalance Co. v. Joseph Halsted Co., supra, Sanborn, J. of the District Court, Northern District of Illinois, declared as follows (page 298):

> "The question of the validity of contracts of sale by an unlawful trust, made in furtherance of the combination, was examined at length in Continental Wall Paper Co. v. Voight, 212 U. S. 227, 256, 29 Sup. Ct. 280, 53 L. Ed. 486, and such a sale was held void in a suit brought on the contract. The Connolly Case was distinguished on the ground that the sale there was not a part of, nor in execution of, any general plan or scheme condemned by the law. It was simply the case of a corporation selling its own goods to a stranger wishing to buy them. But in the Voight Case the sale was based upon agreements which were essential parts of an illegal scheme, the vendee having made a purchasing agreement by which sales were unlawfully restricted. Judgment for the corporation would have given effect to an illegal combination."

Continuing on page 299 the Court further stated:

> "By the amendment now under consideration, it is sought to bring the patent transfer within the Voight Case through the allegation that it was an essential part of the combination. If, in making a decree for infringement or in dismissing for want of it, it were necessary to give effect to an illegal trust, the Voight Case would apply. But a decree adjudging infringement would not do this. It would establish title in complainant and infringement by defendant, and this without touch-

ing the question of illegal combination. That question the Court is not compelled to decide. If a suit were brought directly upon the patent transfer, and the defense that it was an essential part of the unlawful trust were raised, then the court would be obliged to consider that question. The transfer in that event could not be upheld without sustaining also the trust, if one really existed. Not so here. No one is before the Court who has any title or standing to raise the question of trust or no trust; because the patent transfer is valid whether or not any unlawful combination in reality exists."

For similar conclusions, see:

Boatman's Bank of St. Louis v. Fritzlen, et al., 175 Fed. 183;

Steele v. United Fruit Co., 190 Fed. 631.

It is evident, therefore, that to bring the present case within the decision of this Court in Continental Wall Paper Co. v. Louis Voight & Sons Co., supra, it must appear from the facts set forth in the answer filed by the plaintiff in error that it was a party to the unlawful combination, and that the purchase was made in the performance by it of its part of an unlawful contract previously made with the defendant in error, so that to uphold the sale would necessitate giving effect to the unlawful contract.

On the other hand if it does not appear from the facts set forth in the answer that the plaintiff in error was a party to the unlawful combination, but that the purchase in question was made voluntarily, under a collateral, independent contract, and not pursuant to an existing agreement which was unlawful and of which the sale was an inseparable part, then the decision of this Court in Connolly v. Union Sewer Pipe Co., supra, is controlling.

The argument by counsel for the plaintiff in error that the case of Continental Wall Paper Co. v. Louis Voight & Sons Co., supra, is controlling, is predicated upon the premise that "the sales under consideration were made within the knowledge of both buyer and seller with direct reference to and in execution of an illegal agreement." This argument would perhaps be deserving of much consideration if the assumption therein contained were true. But it is respectfully submitted that under the facts as pleaded in the answer of the plaintiff in error, the sales in question were not, and could not have been made with reference to or in the performance of any agreement, either lawful or unlawful, as there existed between the parties no contract of any nature whatsoever. That which counsel for the plaintiff in error persistently refers to as an "illegal agreement" was the offer made by the defendant in error to its customers to give a rebate at the end of a specified time to those who purchased exclusively from it during said period, which it is submitted was nothing more than an offer contemplating a unilateral contract, revokable at any time before acceptance, and until accepted by the offeree by a compliance with its terms cannot be said to constitute an "agreement" or "contract."

Counsel for the plaintiff in error, in both the pleadings and the Brief, has very adroitly characterized this offer always as an "agreement" or "contract," but an examination of "Exhibit A" attached to the answer of the plaintiff in error (page 14 of the Record) and which it is alleged in paragraph 4 of said answer is "a copy of the contract relative to the rebate on its 1906 business, under which it was agreed to give the defendant a rebate of 10 cents per hundred pounds on all shipments of glucose purchased by it from the plaintiff during 1906 provided it gave to the plaintiff its exclusive trade during the year 1907," reveals no contract at all, but only an offer, which does not appear either from the facts alleged in the answer or from "Exhibit A" was ever accepted by the plaintiff in error. It is further alleged in said answer that "A substantially similar contract was en-

sors' (the property of which corporations the defendant afterward bought and to the business of which it succeeded) 'the intention to adopt a liberal plan of profit sharing with defendant and such of its other patrons as should in the future purchase exclusively glucose and grape sugar from plaintiff.' The announcement of an intention to 'adopt a liberal plan of profit sharing' does not create a contract for any definite plan, or for any certain amount or proportion of profits, or one to continue for any certain time."

After discussing in detail the offer made by Corn Products Refining Co., the Court concluded as follows (page 43):

> "The difficulty with the defendant's allegations on this subject is that they show not the slightest agreement or assurance by the plaintiff to the effect stated, nor anything authorizing the defendant to claim any definite contract of the kind which it seeks to enforce. There is an old adage that 'it takes two to make a bargain.' The defendant alone could not make one. Apparently with it 'the wish is father to the thought,' but a Court cannot give damages based on mere anticipations and expectations. One's business or personal associations may prove disappointing and unprofitable, but such unfulfilled hopes, in the absence of definite contract, do not give the right to cure the disappointment with the salve of damages. There was no error in striking the paragraphs of the defendant's answer which sought to recover from the plaintiff on account of a breach of contract."

To bring the case under consideration within the decision in Continental Wall Paper Co. v. Louis Voight & Sons Co., supra, it must appear that the purchase was made "in execution of" an illegal contract. For the purchase to have been in execution of a contract it must appear that there was a contract existing at the time of the

purchase. In order for there to have been a contract existing at the time of the purchase it must appear that the parties were bound by agreement of some sort. "To characterize a thing a contract, which, under the facts alleged, is no contract, is not enough." It follows, therefore, that since at the time of the purchases in question neither the vendor nor the vendee was bound unto the other that there existed between them no contract with which the purchases could have any "legal connection."

The so-called "profit sharing plan" possesses no novel features, being in its essentials one of the oldest established merchandising methods both in this country and elsewhere.

To paraphrase, the seller simply says to the buyer: "If you purchase all of your requirements from me this year, I will return to you a part of last year's purchase money." There is no obligation on the part of the buyer to do this; he can at any time purchase elsewhere, as much or as little as he sees fit.

This method of merchandising is open to all; however, it is a matter of common knowledge that it has of recent years almost entirely fallen into disuse because of its peculiar vulnerability at the hands of competitors, who either "discount" the future prize held out by offering an immediate and present prize in the shape of lower current prices, or else the competitors themselves inaugurate a rival profit sharing plan, arranged with reference to the known terms of the original inaugurator's plan and the known market conditions under which it is operating, so as to more than offset the latter's advantages.

It has frequently been held by the Federal Courts that this and similar methods do not violate the provisions of the Sherman Act.

Whitwell v. Continental Tobacco Co., supra;

In re Corning, supra;

In re Greene, supra.

In the case of Whitwell v. Continental Tobacco Co., supra, Sanborn, J. referring to a plan similar to that under consideration, declared (page 458):

> "If, on the other hand, it promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation."

If the particular merchandising method under consideration is not itself illegal, then, it is submitted that it does not become so merely because employed by a large company, even if we assume the latter has a monopoly—in which case the size and organization of the company, and not its merchandising methods, constitute the gravamen of any violation of the Sherman Act, which, as decided in Connolly v. Union Sewer Pipe Co., supra, cannot be attacked collaterally.

The further defense urged by the plaintiff in error that upon each invoice for the glucose purchased was inserted the clause, "The goods herein sold are for your own consumption only and not for re-sale," which is characterized as "the contract of purchase," is affected with the same fatal infirmity as the allegations concerning the so-called "profit sharing contract," in that the allegation is a mere conclusion of the pleader.

This defense is predicated upon the assumption that a phrase inserted in the invoice alone constitutes a contract.

On page 5 of the Brief submitted by the plaintiff in error, its pleadings upon this point are construed as follows:

"To further effectuate its illegal monopoly the defendant in error inserted in each invoice, including the invoices for the goods on which suit is brought, the agreement that the goods were sold for the consumption of the purchaser only, and not for re-sale. This provision it is alleged appears in all invoices both to the plaintiff in error and to all other consumers of glucose."

Again on page 17 of the Brief submitted by the plaintiff in error, it is stated by way of argument:

"The Court will also bear in mind that the provision in each invoice that the goods covered by it were only for consumption by the purchaser and not for re-sale, was also a part of the contractural relation between the parties.

And on page 19 of the Brief:

"The covenant against re-sale was repeated in each invoice."

This, we submit, is wholly a conclusion of law, because it does not follow from the mere fact that such phrase appeared upon the invoice for the goods purchased that a "contract" thereby existed between the parties binding the plaintiff in error not to re-sell the goods purchased.

As stated by the Supreme Court of Georgia in its decision in Georgia Cane Products Co. v. Corn Products Refining Co., supra:

"To characterize a thing as a contract, which, under the facts alleged, is no contract, is not enough; and a plea based on such allegations is demurrable. • • • • • • • • • • • • • There is an old adage that 'it takes two to make a bargain.' The defendant "alone could not make one."

Attention is called to the fact that in the above case, as in the case under consideration, a general motion to strike the answer was held to be sufficient.

It is well established that an invoice is not a bill of sale, nor is it evidence of a sale, nor does it constitute a "contract of purchase."

In Miller v. Van Tassel, supra, the Court, through Rhodes, J. declared (page 466):

> "An instrument simply expressing that the vendor has sold to the vendee a certain chattel at a specified price, the receipt of which is acknowledged, and which is usually denominated a bill of sale, does not amount, in legal contemplation, to a contract, defined by Parsons (Vol. 1, page 6), as 'an agreement between two or more parties for the doing or not doing of some specified thing,' but amounts rather to a bill of parcels according to commercial usage."

In the case of Dows v. National Exchange Bank of Milwaukee, supra, this Court declared through Mr. Justice Strong (page 630):

> "An invoice is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity and cost or price of the things invoiced, and it is as appropriate to a bailment as it is to a sale. It does not of itself necessarily indicate to whom the things are sent, or even that they have been sent at all. Hence, standing alone, it is never regarded as evidence of title. It seems unnecessary to refer to authorities to sustain this position. Reference may, however, be made to Shepherd v. Harrison, L. R. 5 Eng. & Ir. Ap. Cas. 116, and Newcomb v. R. R. Co., 115 Mass. 230. In these and in many other cases it has been regarded as of no importance that an invoice was sent by the shipper to the drawee of

the drafts drawn against the shipment, even when the goods were described as bought and shipped on account of and at the risk of the drawee."

It is not alleged in the answer that the defendant in error would not sell to the plaintiff in error unless it promised not to re-sell the goods purchased, nor is it alleged that the plaintiff in error did in fact make any such promise.

Even though it were true that such a promise had been made, it does not appear from the answer how this could in practical effect operate to restrain trade. As stated by the Court of Appeals (page 602).

> "If not valid, it is incapable of enforcement, and does not restrain the purchaser from re-selling the goods at his pleasure."

It is clear from the record that the glucose in question was purchased by the plaintiff in error for its own consumption, and not for the purpose of re-sale, and it does not appear in what manner the public is affected by this alleged clause appearing upon the invoice.

It certainly cannot be said that this phrase alone would bring this case within the decision in Continental Wall Paper Co. v. Louis Voight & Sons Co., supra, because in that case to have sustained the sale would have necessarily given effect to a previous written agreement between the vendor and vendee, which was unlawful, and which compelled the purchase, whereas, in the case under consideration it by no means follows that to compel the plaintiff in error to pay for the goods which it has received and consumed would necessitate giving effect to a collateral phrase against re-sale.

Employing the reasoning of Sanborn, J. in the case of United States Fire Escape Counterbalance Co. v. Joseph Halsted Co., supra, it may be said that if, in en-

tering a judgment against the plaintiff in error upon a suit on open account for the purchase price of goods bought, it were necessary to give effect to an illegal trust, the Voight Case would apply. But a judgment compelling the plaintiff in error to pay for what it has received and consumed would not do this. That question the Court is not compelled to decide. If a suit were brought to enforce a promise not to re-sell goods purchased, and the defense that it was void as being in restraint of trade were raised, then the court would be obliged to consider that question. But the suit in question does not seek to enforce any such promise, nor can it be said that a judgment for the purchase price would indirectly give effect to such an agreement, as the purchase by the plaintiff in error was made voluntarily and without reference to any agreement of any kind existing between the parties.

At most, it can only be said that a clause against resale is merely collateral to the sale itself, which, if illegal, falls for its illegality the moment it is made and does not force, or coerce, the vendee to do, or refrain from doing, any act in the future. It in no manner or way prompted, or compelled, the purchase, nor does it in practical effect operate to restrain trade. It cannot be said that a purchase made under these circumstances was made "in execution" of, or "pursuant to," an unlawful agreement in restraint of trade, to which the buyer, as well as the seller, was a *particeps criminis*.

It is therefore respectfully submitted that this case is controlled by the decision of this Court in Connolly v. Union Sewer Pipe Co., supra, and that the judgment of the Court of Appeals of Georgia be affirmed.

JAMES W. AUSTIN.
Attorney for Defendant in Error,
ATLANTA, GA.

JAMES W. AUSTIN,
MORGAN J. O'BRIEN,
ALBERT B. BOARDMAN,
PRESTON DAVIE,
YOUNG B. SMITH,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1914

No. [illegible] 71

D. R. WILDER MANUFACTURING CO.

Plaintiff in Error

versus

CORN PRODUCTS REFINING COMPANY

Defendant in Error

SUPPLEMENTAL BRIEF IN BEHALF OF CORN PRODUCTS REFINING COMPANY, DEFENDANT IN ERROR

JOHN W. [illegible]
Attorney for Defendant in Error

JAMES W. [illegible]
EDWARD J. [illegible]
ALBERT [illegible]
PRESTON DAVIE
YOUNG B. SMITH
Of Counsel

(23,480)

IN THE

Supreme Court of the United States

No. 392 October Term, 1913

D. R. WILDER MANUFACTURING COMPANY, Plaintiff in Error. versus CORN PRODUCTS REFINING COMPANY, Defendant in Error.	Appeal from Court of Appeals of Georgia

SUPPLEMENTAL BRIEF AND ARGUMENT IN BEHALF OF CORN PRODUCTS REFINING COMPANY, DEFENDANT IN ERROR.

Since filing the original brief in behalf of Corn Products Refining Company, the defendant in error, a reply brief has been filed by D. R. Wilder Manufacturing Company, the plaintiff in error. Certain statements and arguments contained in the reply made by the plaintiff in error have made it seem advisable for the defendant in error to file this supplemental brief.

At the outset, the reply brief filed by the plaintiff in error summarizes the contentions of the defendant in error as follows (pages 1 and 2):

> "In the brief of the counsel for the defendant in error, two propositions are asserted: 1. That

the answer does not set out sufficient facts showing the defendant in error to be a combination violative of the Sherman Act on account of its restraint of interstate trade. 2. That no contract of any kind existed between the parties either as to (a) the profit sharing plan, or (b) the covenant against re-sale."

The foregoing, while it states a part of the contentions of the defendant in error, fails to state all of them. The others are:

(3) That if the answer of the plaintiff in error be considered by this Court to allege sufficient facts to show the formation of a combination in restraint of trade, this does not alone preclude the company thus illegally formed from recovering on collateral contracts for the purchase price of goods. Connolly v. Union Sewer Pipe Co., 184 U. S. 679.

(4) That the failure of the plaintiff in error to allege that it was a party to the unlawful combination, and that the purchases in question were made in the performance by it of its part of an unlawful contract previously made with the defendant in error, is fatal to the contention that this case is controlled by the decision in Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U. S. 227.

(5) That the so-called "profit-sharing plan" is not inherently offensive to the Sherman Law.

(6) That if it is not inherently offensive to the Sherman Law, it does not become so merely because employed by an organization which, for the purpose of this argument on demurrer, may be considered a combination in violation of that law.

(7) That this suit does not seek to enforce the alleged clause against re-sale, which, at most, can only be

said to be collateral to the sale, and which clause would not be rendered binding by a judgment for the purchase price of the goods.

In addition to the foregoing, the defendant in error desires to present in this supplemental brief the further contention in support of point one that the pleadings do not show that the sales in question constituted, or were connected with commerce among the several states, or with foreign nations, and therefore no federal question is presented to this Court.

The defendant in error also desires to urge in support of points five and six the further contention that the legality or illegality of the so-called "profit-sharing plan" is not in issue in this case, which seeks only to enforce two entirely separate and distinct promises to pay the purchase price of goods sold and delivered.

The pleadings fail to show that the transactions involved were a part of interstate commerce.

In support of this contention, defendant in error points out that it does not appear, from an inspection of the pleadings, (1) that the contracts of purchase and sale, which are the basis of the suit, were transactions between citizens, or inhabitants, of different states; (2) nor that the alleged illegal agreement relating to the "profit-sharing plan," or the alleged illegal agreement affecting re-sale, were contracts, or agreements, between citizens, or inhabitants, of different states; (3) nor that the subject matter of these agreements, or of either of them, related to interstate commerce; (4) nor that the answer, or the petition, taken in connection with the answer, alleges or shows that the goods in question were transported, or shipped, from one state into another.

The allegations of the answer are wholly silent as to any of these essential averments of fact. Neither does the declaration or complaint, if considered by the Court

in aid of the answer, supply the allegations missing from the answer, unless the exhibits alone, attached to the complaint, may be taken to show, inferentially, that the goods in question were interstate shipments.

If the exhibits to the complaint are looked to, (and it is insisted that these exhibits are the only parts of the entire record which give even the hint of a suggestion going to show an interstate transaction), the following indicia of an interstate shipment are found, viz: upon the invoices attached as Exhibits "A" and "B" to the complaint, appears this dating: "26 Broadway, New York, January 26th, 1909," on "A," and "26 Broadway, New York, January 27th, 1909," on "B," and in each invoice, underneath the dating: "Sold to D. R. Wilder Manufacturing Co., Atlanta, Ga.," and, upon the next line below, the following: "C. & W. I. C. C. of Ga. at Chattanooga."

If these indicia appearing on the invoices, alone, are, in themselves, sufficient to reasonably justify the presumption that the goods sold were shipped from one state into another, it is insisted, nevertheless, that this presumption arising solely from exhibits attached to the complaint, must be excluded by the operation of the rule that **exhibits to a pleading cannot be considered for the purpose of supplying substantial allegations essential to the statement of the cause of action, or defense.**

Hibernia Savings Society v. Thornton, 117 Cal. 481.

It is, therefore, insisted that in so far as the record discloses, the transactions set out in the answer may have been dealings between inhabitants or citizens of the same state, solely; that the goods in question may have been an intra-state shipment, only; and that the acts complained of in the answer, even if taken to be true, could not be held to be in restraint of interstate trade or commerce.

Wherefore, defendant in error contends that no Federal question is presented by this record.

The construction placed by counsel for plaintiff in error upon the offer of Corn Products Refining Co. is erroneous.

Counsel for the plaintiff in error has endeavored to construe the offer made by the defendant in error, which is set forth in Exhibit "A" attached to the answer filed in this case, to mean that in consideration of a single purchase made by the plaintiff in error from the defendant in error, that the latter promises to give a rebate on purchases made during the previous year, provided the plaintiff in error purchases exclusively from the defendant in error during the following year.

On page 11 of the reply brief filed by the plaintiff in error, the following appears:

> "The principles established by the authorities herein cited when applied to the facts of this case require the conclusion that when under the offer made to the plaintiff in error it commenced giving its .909 trade to the defendant in error, it accepted the proposition and furnished a consideration for the contract. The contract was, of course, conditioned on its continuing to give its exclusive trade, and if it failed to do so the promise of the defendant in error never matured, but the contractual relation came into existence when the trading commenced, and from then on the defendant in error could not withdraw from its promise, except upon a breach of the condition which entered into the existing contract of the parties."

However, an examination of Exhibit "A" reveals no such offer. The offer consists of the following letter sent by the defendant in error to the plaintiff in error:

"CORN PRODUCTS REFINING COMPANY,
26 Broadway, New York, March 9, 1907.
"D. R. Wilder Mfg. Co.,
Atlanta, Ga.

"Gentlemen: This Company recognizing the fact that its own prosperity, in a great measure,

is interwoven with the good will and co-operation of its patrons, has decided to adopt a liberal plan of profit-sharing with you, in case you shall in the future continue to give us your exclusive patronage.

"This company inaugurates such a policy of profit-sharing by announcing that it will set aside out of its profits from the manufacture and sale of glucose and grape sugar for the last six months of 1906, an amount equal to ten cents per hundred pounds on all shipments of glucose and grape sugar (Warner's Anhydre and Bread Sugar excepted) which shall have been made to you by this company from July 1st to December 31, 1906.

"This amount will be paid to you or your successors on December 31st, 1907, on condition that for the remainder of the year 1906 and the entire year 1907, you or your successors shall have purchased exclusively from this company or its successors all the glucose and grape sugar required for use in your establishment.

"With the assurance of steadfast co-operation of its customers, given in reciprocation for the benefits conferred upon them, this company confidently anticipates a continuance of such profit-sharing distribution annually to the full extent that its earnings may warrant.

Yours very truly,
CORN PRODUCTS REFINING CO.,
E. B. Waeden."

It is alleged that a substantially similar offer was made with reference to trades in 1907, 1908 and 1909, with the exception that with reference to the latter two years the rebate was advanced from 10 cents to 15 cents per hundred pounds.

Attention is first directed to the date of this offer, which appears to be March 9, 1907. An examination of the terms of the offer shows that the rebate offered was

not on purchases to be made subsequent to the date of the offer, but on purchases which had been made during the period of six months prior to the date of the offer. The offer then provides that the amount of the rebate will be paid to the customer on December 31, 1907, if at that time it shall appear that during the entire period beginning July 1, 1906, and ending December 31, 1907, the customer shall have purchased exclusively from the Corn Products Refining Company.

Attention is also called to the fact that this alleged offer was made in the form of a circular letter, and that as it required that the customer should not only purchase exclusively during the remainder of 1907, but that it should have also purchased exclusively during the period beginning July 1, 1906, and extending to the time of the offer, it was impossible for any customer to whom this offer was made to accept the same, unless, as a matter of fact, it had traded exclusively with the defendant in error from July 1, 1906, until March 9, 1907, being the date on which the offer was made.

It is not alleged in the answer that the plaintiff in error had in fact traded exclusively with the defendant in error, and it does not appear from the pleadings that the plaintiff in error was capable of accepting the offer even had it so desired.

Attention is also directed to the fact that the purchases upon which a rebate was offered were purchases which had been made by the customer several months before the offer was made. Accordingly, the offer made in 1909 was an offer of rebate on purchases which had been made in 1908, and in order for the customer to have accepted this offer, it must appear at the end of 1909, that during the period beginning in 1908 and ending in 1909, that the purchaser had traded exclusively with the defendant in error. It is admitted in the answer filed by the plaintiff in error that it did not trade exclusively with defendant in error during the period extending over

1908 and 1909, and therefore it is admitted that the offer made with reference to these years was not accepted.

Attention is further called to the fact that under this series of offers, a rebate upon purchases made in 1909, would not be offered until the year 1910, a year after the filing of this suit. So that it does not appear from the record that any offer of rebate was ever made by the defendant in error to the plaintiff in error with reference to the purchases in question.

It cannot, therefore, be said that the purchases upon which a rebate was offered were made by the plaintiff in error in consideration of a promise. Indeed, the purchases upon which a rebate was offered had been made before the offer came into existence. What then was the true meaning and significance of this offer? In effect, it was nothing more than an announcement by the defendant in error of an intention to return to its customers a certain part of the purchase money received on account of past purchases if at the end of a specified period of time, part of which time was before the making of the offer, and part of which was subsequent to the offer, it appeared that during the entire time the customer had traded exclusively with the defendant in error. There was no promise on the part of the customer to purchase exclusively, or at all. Nor was there a promise made by the defendant in error that it would sell to the customer in case it desired to purchase. At most, it was an offer calling not for one additional purchase to be made by the offeree after the date of the offer, but one which required the customer to purchase all of its requirements during the time specified from the defendant in error.

For illustration, it is submitted that under the terms of the offer set out in Exhibit "A" to the answer that if the customer had made one or two purchases after the date of the offer, but on December 31, 1907, it appeared that from July 1, 1906, to December 31, 1907, the cus-

tomer had not purchased all of its requirements from the Corn Products Refining Company, there would have been no acceptance of the offer, and therefore no contract.

Thus, the act called for by the offer was not the act of making one, or two, additional purchases, but rather the act of making all purchases during the specified time, however many there might be, from the defendant in error. It is obvious, therefore, that it was impossible to ascertain whether the terms of this offer had been accepted until the end of the time specified, and it appeared that the customer had during the entire time given to the defendant in error its exclusive patronage, and therefore no contract could have existed until the end of said period.

Counsel for plaintiff in error cites familiar illustrations of contracts wherein the consideration has been fully executed by the promisee and the liability of the promisor upon his promise remains contingent upon the happening of certain conditions, as where a sale of land has been made with a provision in the contract that the seller shall have the right to re-buy within a certain time at a specified price, or where in consideration of services rendered or money expended by a real estate broker the owner of land promises the broker the exclusive right to sell the land within a specified time. But these illustrations are not in point, and the principles there involved have no application to the case at hand.

It is submitted that counsel for the plaintiff in error has confused **consideration**, which is necessary to render a promise binding, and **acceptance of an offer**, which is necessary to constitute a contract. It is true that under many circumstances the same act or acts of the promisee may constitute both an acceptance of the offer, and the consideration for the promise made by the offerer, but under no circumstances can there exist a contract where

either of these elements is lacking. Thus where an offer calls for the performance of a series of acts by the offeree, the performance of some of the acts without a performance of all of the acts does not constitute an acceptance of the offer, and there is no contract. So, in the present case the admitted failure of the plaintiff in error to make all of its purchases during the time specified in the offer from the defendant in error constituted a rejection of the offer, and there was no contract.

Being a mere offer, it was revocable at any time before acceptance, and there could be no acceptance except in the exact terms of the offer and until all of the terms of the offer had been complied with.

It matters not that the plaintiff in error made some purchases after the date of the offer. If in fact it failed to purchase exclusively from the defendant in error during the time specified in the offer, the offer was never accepted, and there never existed between the parties a contract.

In support of this contention, the following cases are cited as authority:

Teipel v. Meyer, 106 Wis. 41;

Hoffman v. Maffioli, 104 Wis. 630;

Higbie v. Rust, 211 Ill. 333-337;

Darr v. Mummert, 57 Neb. 378.

The so-called "profit-sharing plan" is not offensive to the Sherman Law.

Whether the issue of the announcement by the defendant in error that it would divide a part of its previous year's profits with those of its customers purchas-

ing from it exclusively during a specified time (Record, page 14) constituted a mere continuing offer contemplating a unilateral contract, as contended in our original brief, or whether it was an offer which was accepted and became a contract as soon as the first order of a buyer was accepted, is immaterial as far as the question of the inherent legality of the "profit-sharing plan" itself is concerned. In either case there was no obligation on the part of the buyer to purchase exclusively, or, for that matter, at all, from the seller. The buyer was entirely free to purchase at will from others upon such terms and conditions as he chose; indeed, in the present case, the pleadings show the buyer admittedly did just this thing.

In its ultimate analysis the so-called "profit-sharing plan" consisted of nothing more or less than offering an inducement for custom. The inducement instead of, as in this case, being in the form of a rebate on past purchases, might have taken the form of more efficient service, longer credit, or, in fact, any one of an infinite variety of inducements to encourage increased or exclusive purchasing by the buyer. To condemn such a transaction is to condemn trade itself which has for its very foundation the offering of inducements for custom.

There is a very clear distinction between contractual obligations enforcing exclusive patronage, and mere inducements offered for voluntary exclusive patronage. The former might, perhaps, be said to restrain trade in certain cases, because purchasers are thereby removed from competition and prevented from stimulating it by their ability to accept competitive offers of better service, terms, or goods. Mere inducements offered to obtain customers' voluntary exclusive patronage, however, are not open to this objection, since purchasers are not thereby removed from competition, but, on the contrary, are left free to purchase where and when they choose, thus stimulating competition by their ability to accept more favorable inducements offered in competition with those based on exclusive patronage.

There is, moreover, no legal distinction between an inducement offered for voluntary exclusive patronage, and other trade inducements. Every seller necessarily monopolizes a customer's trade or restrains others from trading with him to the extent that he succeeds in obtaining such customer's business, whether he obtain 10%, 50% or 100% of such business. It is the **means** by which the business is obtained and not the result by which the legality of the transaction is determined. If by superior service, quality, or terms of sale, the seller succeeds in obtaining a part, or all of a customer's trade, he violates no law. What distinction, then, is to be drawn between voluntary exclusive patronage, obtained by giving a prize in the form of superior service, or quality, and exclusive voluntary patronage obtained, as in the present case, by offering a money prize? Obviously none. Any other conclusion leads to absurd illogicalities.

It may be argued, however, that while there is no offense involved in a small producer obtaining exclusive voluntary patronage by offering inducements of one form or another, nevertheless, for a large purchaser or a monopoly to do so is illegal. This brings up another point under consideration, namely:

If the so-called "profit-sharing plan" is not inherently offensive to the Sherman Law, it does not become so merely because employed by an organization, which, for the purpose of this argument on demurrer, may be considered a combination or monopoly in violation of that law.

A system of merchandising not inherently offensive to the Sherman Law does not become so by reason of the size or control over interstate commerce of the organization employing it. If it is not illegal for a small competitor to use a given system of selling goods, that system does not become illegal merely because used by a large competitor, or even a monopoly, or combination violative of the Sherman Law. The legality of the mer-

chandising system is one question; the legality of the organization of the user is an entirely separate and distinct question. One merchandising method when used by even the smallest competitor, because of its inherent illegality, may offend against the Sherman Law. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U. S. 502. Another merchandising method, because of its inherent inoffensiveness when used even by a monopoly may not offend. Connolly v. Union Sewer Pipe Co., 184 U. S. 679. In such cases the legality of any given merchandising method is a collateral question, unrelated to and distinct from the question of the legality under the Sherman Law of the organization using it; the first question depending upon the inherent qualities of the system itself; the second question upon the power, actual or potential, of the organization using it, to monopolize or restrain interstate commerce.

If in the present case on demurrer we assume as true the allegations in the answer that the defendant in error is a monopoly composed of all the previously competing companies in the United States, and that its organization offends against the Sherman Law, nevertheless the plaintiff in error cannot avoid paying for goods purchased from it and admittedly received, by alleging its use of an inherently inoffensive merchandising method, namely, the offer of a part of its previous year's profits in return for exclusive voluntary patronage, a merchandising method, moreover, which, at the time it was employed by the defendant in error, had received the approval of no less than three United States Courts, including one Circuit Court of Appeals.

In re Corning, 51 Fed. 205;

In re Green, 52 Fed. 105;

Whitwell vs. Continental Tobacco Company, 125 Fed. 454.

The legality or illegality of the so-called "profit-sharing plan" is not in issue in this case, which seeks to enforce two entirely separate and distinct agreements for the simple purchase and sale of goods.

The pleadings show that the action seeks to enforce two separate and distinct contracts entered into between the plaintiff and defendant in error for the simple purchase and sale of certain described goods at an agreed price. The invoices covering these sales are shown in defendant in error's "Exhibit A" and "Exhibit B." (Record, page 10.) Whether the "profit-sharing plan" be considered a contractual relation or merely a rejected offer (the pleadings showing that the plaintiff in error admittedly did not comply with its terms), the fact remains that in this action it is not sought to enforce any rights or obligations created by the so-called "profit-sharing plan." Irrespective of the legality of this plan, it is submitted that the contracts, the enforcement of which is being sought in this action, are simple contracts of purchase and sale, falling entirely within the scope of the Connolly Pipe case; the rights and liabilities created by them were entirely separate and distinct from those created under the "profit-sharing plan"—the rescission of the latter contract, if it be held a contractual relation, in no wise affected the rights of the parties under the separate and distinct purchase and sale agreements. In other words, it is submitted, there was no such interdependence or co-relation between these contracts as to make the legality of the purchase and sale contracts dependent upon the legality of the profit-sharing contract, or vice versa. Did the present case seek to enforce some right or obligation created by the "profit-sharing plan," and were this plan offensive to the Sherman Law, then, and then only, would the present case be brought within the scope of the Voight Wallpaper case.

The legality of the clause against re-sale is not in issue in this suit.

Likewise, it is submitted that this suit does not seek to enforce the alleged clause against re-sale, which, at most, can only be said to be collateral to the sale, and which clause would not be rendered binding by a judgment for the purchase price of the goods. It does not appear from the pleadings that this clause entered into the consideration for the sale, and, as declared by this Court, through Mr. Justice Holmes, in the case of Cincinnati P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, at page 185:

> "It only remains to say a word as to the agreement to maintain rates. This is a covenant by the purchaser, the plaintiff in error. It is not the covenant sued upon. It is not declared to enter into the consideration of the sale. If necessary, we would be astute to avoid allowing a party to escape from his just and substantially legal undertaking on such a ground. The argument on the other side requires us to import a subordinate undertaking of the buyer into the consideration for that which was the consideration of his debt, and, in that round about way, to make the debt unlawful. We shall not go into such niceties beyond noticing that they are not encouraged by the cases. Oregon Steam Nav. Co. v. Winsor, 20 Wall, 64, 22 L. ed. 315 Bank of Australasia v. Breilat, 6 Moore, P. C. C. 152, 201; Pigot's Case, 11 Coke, 26b, 27b."

All of which is respectfully submitted:

JAMES W. AUSTIN,

Attorney for Defendant in Error.
ATLANTA, GA.

JAMES W. AUSTIN,
MORGAN J. O'BRIEN,
ALBERT B. BOARDMAN,
PRESTON DAVIE,
YOUNG B. SMITH,
Of Counsel.